

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Brian Melendez,

Complainant,

vs.

ORDER OF DISMISSAL

Employee Freedom Action Committee,  
Minnesotans for Employee Freedom  
Steering Committee, and King Banaian,

Respondents.

On July 24, 2008, Brian Melendez filed a Complaint with the Office of Administrative Hearings alleging the Respondents violated Minn. Stat. §§ 211B.04 and 211B.06 by preparing and disseminating campaign material that is false and that fails to have the proper disclaimer. The Chief Administrative Law Judge assigned this matter to the undersigned Administrative Law Judge on July 24, 2008. A copy of the complaint and attachments were sent by U.S. mail to the Respondents on July 24, 2008.

After reviewing the Complaint and attached documents, the undersigned Administrative Law Judge has determined that the complaint does not set forth a prima facie violation of §§ 211B.04 or 211B.06.

Based upon the Complaint and the supporting filings and for the reasons set out in the attached Memorandum,

**IT IS ORDERED:**

That the Complaint filed by Brian Melendez against Employee Freedom Action Committee, Minnesotans for Employee Freedom Steering Committee, and King Banaian for violation of Minn. Stat. § 211B.06 is DISMISSED WITHOUT PREJUDICE. The Complainant may revise and file a subsequent complaint regarding alleged violations of Minn. Stat. § 211B.06 in connection with the advertisement at issue without paying an additional filing fee. The Complaint filed under Minn. Stat. § 211B.04 is DISMISSED WITH PREJUDICE.

Dated: July 29, 2008

s/Barbara L. Neilson

BARBARA L. NEILSON

Administrative Law Judge

## MEMORANDUM

The Complaint concerns the Minnesota U.S. Senate race. The Complaint alleges that a newspaper advertisement produced and distributed by the Respondents contained false campaign material with respect to candidate Al Franken. Specifically, the advertisement states:

Al Franken . . . supports a federal bill that would force Minnesota's workers into labor unions by eliminating their right to [a] private ballot vote.

The Complaint maintains that this statement is false. According to the Complaint, the bill to which the advertisement refers (the Employee Free Choice Act) "does not eliminate but in fact guarantees the right to a secret ballot in union-organizing votes."

Minn. Stat. § 211B.06, subd. 1, prohibits intentional participation:

... [i]n the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

In order to be found to have violated this section, a person must intentionally participate in the preparation, dissemination or broadcast of false campaign material that the person knows is false or communicates with reckless disregard of whether it is false.

The term "reckless disregard" was added to the statute in 1998 to expressly incorporate the "actual malice" standard from *New York Times v. Sullivan*.<sup>1</sup> Based on this standard, the Complainant has the burden at the hearing to show by clear and convincing evidence that the Respondents prepared or disseminated the advertisement knowing that it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to prove the Respondents "in fact entertained serious doubts" as to the truth of the ad or acted "with a high degree of awareness" of its probable falsity.<sup>2</sup>

The advertisement notes that it was paid for by Minnesotans for Employee Freedom, and the Steering Committee for that group is a named Respondent. The Complaint does not identify the other two named Respondents (the

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<sup>1</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

<sup>2</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also *Riley v. Jankowski*, 713 N.W. 2d 379 (Minn. App.) review denied (Minn. 2006).

Employee Freedom Action Committee and King Banaian) or allege any facts to support an allegation that they participated in the preparation or dissemination of the material knowing it was false or with reckless disregard of its falsity.

For purposes of a prima facie determination, the Complainant must detail the factual basis to support a claim that the violation of law has occurred.<sup>3</sup> Here, the Complainant has not alleged with any specificity why the statements at issue are factually false. The Complaint merely asserts that the bill does not eliminate but in fact guarantees the right to a secret ballot, without providing any further information about the bill or attaching a copy of the bill.

A complaint claiming a violation of Minn. Stat. § 211B.06 must detail the factual basis of the claimed violation. At a minimum, the Complaint must allege sufficient facts or provide supporting documentation from which knowledge or reckless disregard of the falsity of the statement on the part of the persons who prepared or disseminated the material may be implied. The Complaint in this matter fails to meet that requirement. The Administrative Law Judge concludes that the Complaint does not allege sufficient facts to support a prima facie violation of Minn. Stat. § 211B.06.

For these reasons, the Complaint under § 211B.06 is dismissed without prejudice. The Complainant may revise and file a subsequent complaint regarding alleged violations of Minn. Stat. § 211B.06 in connection with the newspaper advertisement at issue without payment of an additional filing fee.

The Complaint also alleges that the advertisement failed to have a “proper address” in violation of Minn. Stat. § 211B.04. On April 26, 2006, the Minnesota Court of Appeals issued its decision in *Riley v. Jankowski*,<sup>4</sup> holding that the disclaimer requirement of Minnesota Statutes § 211B.04 violates the First Amendment of the U.S. Constitution by directly regulating the content of pure speech and that there is no way to narrowly construe the statute to avoid the constitutional violation. Because the Minnesota Court of Appeals has determined that Minn. Stat. § 211B.04 is unconstitutional on its face, this allegation is dismissed with prejudice.

**B.L.N.**

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<sup>3</sup> Minn. Stat. § 211B.32, subd. 3.

<sup>4</sup> 713 N.W.2d 379, 401 (Minn. App. 2006), *rev. denied* (Minn. July 20, 2006).